

IN THE MATTER OF THE Ontario Human Rights Code
R.S.O. 1990, c.H.19

AND IN THE MATTER OF the Complaint
of Joseph Oliver dated January 10,
1992 alleging discrimination in
services on the basis of sexual
orientation by the Corporation of
the City of Hamilton and Mayor
Robert Morrow.

BETWEEN:

Joseph Oliver

Complainant

Ontario Human Rights Commission

- and -

Mayor Robert Morrow,
Corporation of the City of Hamilton

Respondents

BEFORE:

Elizabeth Beckett

Chairperson

APPEARANCES:

Susan Ursel, for the Complainant, Joseph Oliver

Kikee Malik, for the Commission

Patrice Noe-Johnson, for the Respondent Corporation

William Dermody, for the Respondent, Robert Morrow

INTRODUCTION

This is a complaint by Joseph Oliver alleging discrimination based on sexual orientation, against the Mayor of Hamilton, Robert Morrow and against the City of Hamilton.

Mr. Oliver requested, in May of 1991, on behalf of the Gay and Lesbian Alliance, GALA, that Mr. Morrow issue a proclamation in celebration of Gay Pride Week during the week of June 13-16, 1991. Mr. Morrow refused this request. Mr. Oliver believes that the refusal was because of the sexual orientation of the members of GALA and therefore was contrary to the Ontario Human Rights Code, R.S.O. 1990, c. H.19. It is also alleged that the City of Hamilton, in its corporate identity as City Council, should have issued the requested proclamation when they knew that the Mayor had refused to do so. By failing to do this, it is alleged, they also contravened the Code. The complainant further alleges that the City of Hamilton is vicariously liable for the actions of the Mayor in this regard.

FACTUAL HISTORY

In order to put Mr. Oliver's request in context it is necessary to review the place of GALA in the Hamilton community. The history of GALA was given by several witnesses including Mary Cahill, Rui Pires, and Mr. Oliver himself. All of these people had long associations with the gay/lesbian community in Hamilton and held positions in the various organizations described below. Their testimony revealed that the organization of gay and lesbian people

in Hamilton began with a group who met regularly at McMaster University as the McMaster Homophile Association. Although this organization was open to people both on and off the University campus, it was decided in the early 1980's that there was a need to move off the campus in order to broaden the base of this organization. A core group of people from the MacMaster Homophile Association created a new organization called Hamilton United Gay Societies (HUGS) which was incorporated in 1982.

HUGS established itself in Hamilton's downtown core and became an umbrella organization for other gay support activities in the Hamilton area. Exhibit 16 lists thirteen separate activities and/or groups that HUGS supported. HUGS published a newsletter, sponsored dances, had phone lines for gay concerns and had representatives on various boards that involve the particular issues of the gay community. It also engaged in political action. Hamilton Aids Network for Dialogue and Support, HANDS, was one of the initiatives taken by this group of people.

Late in the 1980's the name was changed to Hamilton Gay and Lesbian Alliance (GALA), to reflect the organization's commitment to women's issues. Early in 1991 the gay and lesbian community represented by GALA decided that they wanted a celebration and formed a committee to organize Festival '91. Mr. Oliver was the coordinator of this event. The purpose of the project as outlined in a letter to the Mayor of Hamilton dated May 9, 1991 (exhibit 20) was to:

" - showcase our many talented gay and lesbian artists, musicians, and business people.

- provide a public forum for professional and lay-people to discuss, and heighten awareness of gay/lesbian related issues in the Hamilton area.
- provide a social/recreational outlet for our community to interact with the broader community, during Gay/Lesbian Pride Week in Hamilton.
- provide a positive opportunity for the broader community to increase their knowledge of the gay/lesbian community."

It was the testimony of Mr. Oliver that the scheduling of the event at the end of June was significant because June 25 is recognized as a traditional day to celebrate Gay Pride. On this day in 1969 the New York City police raided the Stonewall bar in that city. This bar was well known as a "gay" bar and the police activity was perceived by the patrons as harassment. The resistance to this raid is seen in the gay community as a significant turning point in the struggle of gay and lesbian people to take their place in the broader community.

The Hamilton event was to conclude with a banquet at which The Honourable Svend Robinson M.P. was to speak. The planners produced brochures, advertised widely, booked rooms in the local library, at churches and at the Royal Connaught Hotel. A local theatre was also rented in order to screen films. The brochure contained advertisements from many local businesses(Exhibit 18). Six thousand brochures were distributed in south western Ontario and northern New York State.

As the planning progressed it was decided to request a proclamation from the Mayor of Hamilton (exhibit 19). Following

instructions received from City Hall a package was prepared. It contained a three page letter, dated May 9, 1991, outlining the history and current work of GALA, a festival brochure which was in the style of a broadsheet newspaper and gave full particulars of events, and a document with suggested wording of the requested proclamation (exhibit 20). This package was hand delivered to City Hall by Mr. Rui Pires within a few days of it being drafted. Mr. Pires testified that he gave the letter to the secretary in the Mayor's office telling her that it was a request for a proclamation from GALA. He told her that deadlines were involved and that it was important that the Mayor see it as soon as possible.

The group heard no response from the Mayor, so on June 3, Mr. Oliver went to City Hall and spoke to Mrs. Brown, the administrative assistant to the Mayor. She could not find the request and advised Mr. Oliver that GALA would have to apply again. The beginning of the Festival was less than two weeks away and time was now of the essence. That night the festival planning committee met and subsequently a new letter was drafted by Mary Cahill (exhibit 10). It was hand delivered, together with the information contained in the first request, by Mr. Oliver the next day (June 4). While he was at City Hall delivering the second request, Mr. Oliver spoke to three councillors to seek their support for GALA's request. These were Aldermen Agostino, Lombardo and Hinckley. He also distributed a package of material about GALA and Festival '91 to each Councillor's office including an invitation to attend the banquet at which Mr. Robinson was speaking. Invitations were also

distributed to all local members of the provincial legislature and the local elected members to the federal parliament.

The requested proclamation was to read:

"Whereas: the City of Hamilton has a large and diverse Lesbian and Gay Community and

Whereas: June is recognized as Lesbian and Gay Pride month across North America by the Lesbian and Gay community, and

Whereas: the City of Hamilton acknowledges the important services of Hamilton Gay and Lesbian Alliance (Hamilton GALA), and

Whereas: Hamilton Gay and Lesbian Alliance has chosen to hold Lesbian and Gay Community celebrations from June 13th. to June 16th., 1991 throughout Hamilton, and

Whereas: the City of Hamilton welcomes the opportunity to participate in these celebrations called Festival '91 and thereby acknowledges the efforts of the volunteers of Hamilton Gay and Lesbian Alliance,

Now therefore: I, Robert Morrow, Mayor of the City of Hamilton, do hereby proclaim June 13th to June 16th., 1991 to be Lesbian and Gay Pride Week in the City of Hamilton, and encourage all of our citizens to recognize this community's unique history and contribution to our multicultural society."

(Exhibit 10)

It is noted that the proclamation was to be for a "Lesbian and Gay Pride Week" even though it actually mentioned only the days of Festival '91, i.e., June 13 -16th.

On June 7, 1991 Mr. Morrow called Mr. Oliver and set up a meeting which took place at the Mayor's office on June 10th. At this meeting the Mayor told the representatives from GALA in attendance that he would not issue the proclamation. He gave four reasons which were reiterated later in a letter to GALA and repeated again in the Mayor's response to the Human Rights complaint filed by Mr. Oliver. In the Mayor's testimony before

this Board he gave the same reasons for his refusal to issue the requested proclamation. They are quoted below as set out in the complaint of Mr. Oliver.

"a) He believed it would set 'our' cause back stating that "By proclaiming Lesbian and Gay Pride Week, it will cause your movement more harm than good."

b) He expressed concerns for 'vulnerable and sensitive members'.

c) He did not believe there would be a City Consensus to support the proclamation.

d) He felt the timing of our request was not right."

At the end of the meeting GALA asked that the reasons be put in writing.

Festival '91 went ahead as planned and the organizers were well pleased with the event. In all 3,600 tickets were sold to the various events and it was estimated that 1,800 people attended Festival '91. Ms. Cahill testified that this "was a far cry from 100 people attending a dance on Gay Pride Day."

Michael Johnstone, who was then president of GALA wrote to the Mayor on September 23, 1991 asking again for written reasons for the refusal of the proclamation (exhibit 24). The Mayor responded to GALA by letter dated October 8, 1991. In this letter he reviewed his support of activities in the community related to gays and lesbians but stated at paragraph five:

"With respect to your request of September 23, I can simply reiterate what I said in June, namely that I could not proclaim Gay Pride Week in the City because it would be so overwhelmingly opposed by the members of our community." (exhibit 11)

At the meeting with the Mayor on June 10th some suggestion was made that the group should go to City Council to request the

proclamation. The timing required for such a request made this unworkable as the item could not be placed on the agenda for the Council meeting prior to the event. Mr. Oliver also testified that they protested this suggestion of the Mayor at the meeting as no other group, to their knowledge, had been required to go before Council to request a proclamation. In any event, no request was made of the City Council.

There was a dispute at the hearing as to whether the issue of "timing" cited by the Mayor, alluded to the timing of the Council meeting or to the fact that a Municipal election was to be held that fall and that issuing the proclamation would be detrimental to the Mayor who was seeking re-election. In my opinion a determination of that issue is not relevant to the matter before me.

Following receipt of the October 8 letter from the Mayor, the decision was taken to make a complaint to the Human Rights Commission. This was done and a formal complaint was signed in January of 1992.

There was evidence heard during the course of the hearing regarding the treatment of gay and lesbian persons by the officials at Hamilton City Hall. Representation or refusal for representation on City Hall committees was cited. The Mayor also gave evidence about various initiatives he took on behalf of this community and in support of human rights in general. I do not intend to review this evidence. While the treatment experienced by the group represented by the complainant may have helped motivate

the complaint to the Commission, and while the history of the Mayor in supporting human rights issues in the City of Hamilton may establish that his motivation in this matter was benign, in the end neither of these facts is relevant to the narrow issues I was appointed to decide.

ISSUES

The essential facts of this case are those set out above and are not in dispute. The issues raised by this case are as follows:

1. Is the issuance of a Mayoral proclamation a service as defined by the Ontario Human Rights Code, 1981, R.S.O. 1990, c H.19?
2. If the answer to number one is "yes", did the Mayor of Hamilton offend the Code by refusing to grant Joseph Oliver's request, on behalf of The Gay and Lesbian Alliance of Hamilton, that the week of June 13 -16, 1991, be proclaimed as Lesbian and Gay Pride Week?
3. If the answer to number two is "yes", is the City of Hamilton liable, either directly by not moving to do that which the Mayor refused to do, or vicariously because of their relationship to the Mayor?

1. IS THE ISSUANCE OF A PROCLAMATION A SERVICE UNDER THE CODE?

Proclamations are mentioned in two Ontario statutes. Section 214 (8) of the Municipal Act, R.S.O. 1990, c. M. 45, provides for the head of Council, that is the Mayor, to proclaim a day as a civic holiday, and section 236 (14) authorizes Council through by-law, to have tag days. There was no evidence concerning the meaning or use of the section as it related to "tag days". Section 20 of the Education Act, R.S.O. 1990, c. E. 2 authorizes the Board

of Education head to proclaim a school holiday. The Criminal Code provides that the Mayor of a City may, if "twelve or more persons are unlawfully and riotously assembled together" proclaim the riot act (section 67). This is the extent of statutory reference. None of the statutes give a definition of the word "proclamation".

The struggle of this Board to determine the exact nature of a proclamation in present day usage was greatly assisted by the testimony of Mr. George Rust D'Eye. Mr. Rust D'Eye was qualified as an expert witness concerning municipal law. He testified that there is no statutory basis for the issuing of proclamations by a City Council and that although Mayors of municipalities issue numerous proclamations, few of them fall into the statutory categories mentioned above. The duties of the Mayor as Chief Executive Officer of the City Council are found in section 69 of the Municipal Act. Sections 69 and 70 of that Act taken together, set out the complete statutory duties of a Mayor. Neither of these sections mention proclamations or indeed mention anything under which a proclamation would logically fit. There was some suggestion that the right to make proclamations may exist at common law and therefore be part of the legally defined office despite the fact that the office has now been defined by statute. Mr. Rust D'Eye testified, however, that in his opinion the issuance of proclamations had no legal significance and was not founded at law as the duties of the Mayor and Council were now completely defined by statute.

Mr. Rust D'Eye stated that, in fact, there were many things a

Mayor would do that had no legal significance and were therefore not based in statute or common law. He said:

"The head of Council may be asked to present the keys of the City to someone, whatever that means, may be asked to ride in a parade, to sit on a reviewing stand of a parade, to attend a luncheon, to present a reward, to proclaim a special day, to lay a wreath at a cenotaph, to allow his picture and forward (sic) to be inserted in a publication of community interest. To send a congratulatory telegram. ... A proclamation is just one of those things, and it is something which people seek because they think that this will in effect elevate their prestige, it will imply an acceptance of a public interest or a public service that they're performing, will involve at least an apparent sanction and support for what they're doing and will provide publicity for their event."

Mr. Rust D'Eye explained in reference to proclamations that:

"Many of them are not known except to a very small number of people. Records may be kept of them. They may be given for very large events. They may be given for very small events. They may apply to only one street. They may apply to only one or two people.

There are no rules, because of course once again, it is not a legal power. It's a head of Council being in a position to receive requests from members of the community to do something with which they perceive will be a benefit to them and which may imply support and which may get them publicity and therefore, make them feel better and attract more people to whatever they're doing and thereby support their cause." (transcript page 92) ...

Whether or not the issuance of proclamations is a legal act, it is clear that mayors do issue proclamations. This Board was presented with copies of formal proclamations proclaimed by the Mayor during the time relevant to this case. Two hundred and thirty five proclamations were declared from January 20, 1990 to June 22, 1992. The Mayor testified that he issues proclamations regularly, some of which were not part of the exhibit.

The relevant portion of s. 1 of the Human Rights Code

provides as follows:

"Every person has a right to equal treatment with respect to services ... without discrimination because of ... sexual orientation."

The word "services" is not defined by the Code except to say that:

"services does not include a levy, fee, tax or periodic payment imposed by law." (s. 10(1)(i))

There was no argument made that proclamations fit under the exception quoted above. Rather, the argument was that proclamations were not a service at all and therefore are not covered by the Code. The Mayor argued that what GALA was in effect asking for was a declaration of political support from a political person and as such this request should not be governed by the Code because expression of political opinion is a very highly held freedom in our country and should not be in any way limited. It was argued that political support is not something to which any member of the public has a right, nor was it something that legislation should be seen to require.

The concept of "political support" is very difficult to define. In some sense everything done by a person in political office is political and has consequences of a political nature. The Mayor testified, however, to his belief that once in office one should only think of serving that office and not be concerned about the future in terms of election. The Board agrees that when the Mayor makes a proclamation he is not campaigning per se, but is merely carrying out a privilege of his/her office. When a person is serving as a public official he/she may well be building a

reputation that will have consequences at the time of an election but I do not believe that this places those actions beyond the purview of the legislation of this province.

The Mayor of Hamilton, for example, proclaimed "Sheila Copps Day" on June 13, 1990. Could we draw from this that he was personally supporting the Federal Liberal Party and using his office to further its fortunes in Hamilton? The Board believes it would be more accurate to say that the Mayor was using his office to present the congratulations of the City on a very worthy accomplishment of one of its well known daughters. There is no question that it well serves Ms. Copps and her political career to have her name before the public in this positive way but I do not believe that this puts the Mayor's actions into the realm of a political statement of support for the Liberal Party. The proclamation of "Management Week" would, if this were the case, appear to mean that the Mayor is in support of Management, while the proclamation of "Union Label Buying Week" which the Mayor also proclaimed, would mean that he was in favour of Unions.

The proclamations of "Black History Day", "The Year for Racial Harmony" and "International Day for the Elimination of Racial Discrimination" indicate that the Mayor has issued proclamations for other groups protected by the Human Rights Code. Proclamations of "Lithuanian Independence Day", "Croatian Independence Day", "Grape Boycott Week", "Keep Medicare Healthy Week", show that proclamations have been issued in matters on which Hamiltonians are likely not in full consensus.

The Mayor testified that he has sometimes refused proclamations. He did not give any examples of this. It would have been useful to hear of other circumstances where the Mayor had used his discretion to deny a request. It would have assisted the Board in testing the credibility of the argument that the Mayor should have the right to deny requests that he cannot politically support. In the absence of this evidence the only proclamation request the Board knows was refused was that of the complainant. The Mayor did testify that he sometimes "worked with a group to come up with wordings that (he) felt would be acceptable". He cited working with the local "Right To Life" group in this way; however, the Board was not presented with the actual proclamation that was agreed on by the parties. A review of the proclamations found in the relevant exhibit does not reveal an identifiable political stance. And, consistent with Mr. Rust D'Eye's assessment of this activity it shows that various groups and individuals approach the Mayor for proclamations to advertise their presence in the community and to get whatever benefit they perceive such a proclamation will give.

Even if proclamations were of a political nature, I do not believe that this would put them outside the parameters of the Code. The actions of a Mayor in this regard do not have the same protection of privilege which attaches to legislative debates. Further, if a Mayor had the right to use his own office as opposed to his campaign for that office in a manner that caused or condoned the discrimination of a protected group under the Code, this would

be repugnant to the citizens of the province.

The Code does not qualify the term "service" and because the Code is remedial legislation, the word "service" must be given a broad and liberal interpretation. Members of the community clearly see the granting of a proclamation as a service. If the members of the Hamilton community have gone to the Mayor at least 235 times over a thirty month period to request something, how can it possibly be seen as something other than a service to them. Several dictionary definitions of the word "service" were submitted to the Board and needless to say none of them mentioned "proclamations". Service was defined in terms such as "helping", "benefiting", "assistance", "supplying a public need", "actions or use that furthers some purpose or need". These terms all fit with the use the public makes of proclamations.

Issuing a proclamation is a service because it is generally perceived in the community as being a benefit to the groups that seek it and therefore it should be seen as a legitimate privilege to which citizens have access without fear of discrimination.

2. DID THE MAYOR OF HAMILTON OFFEND THE CODE BY REFUSING TO GRANT JOSEPH OLIVER'S REQUEST, ON BEHALF OF THE GAY AND LESBIAN ALLIANCE, FOR A PROCLAMATION?

The Mayor gave four reasons for his decision to refuse the proclamation request of GALA. His reasons suggest that he was attempting to protect the group from the reaction of homophobic members of the Hamilton community. As Ms. Cahill said in her testimony, "The Mayor intended that we should remain safe by

staying in our closets. We did not intend to do that." All of his stated concerns rested on the assumption that some members of the Hamilton community would react in a way that was harmful either to the Gay/Lesbian community as a whole or to individuals within it.

There was a great deal of evidence called by Mr. Oliver to dispute the conclusions of the Mayor. I do not intend to review this evidence because in my view it is irrelevant to my findings.

The basis of the Human Rights Code is that every individual or group has the right to be treated with respect and dignity. A group has the right to make their own decisions about what they want to do to further their own interests as they see them. Other members of the community may disagree but that does not give them a right to step in and limit a group's legal attempts to do what they perceive as right. The paternalistic attitude of the Mayor towards the gay and lesbian community is similar to the attitude of male employers that resulted in women being excluded from jobs that were formerly male dominated. The employers' decisions, in those instances, were based on their desire to "protect" women but had the result of excluding women from types of employment they chose to pursue for their own reasons. Human rights legislation was interpreted as giving women the right to make their own decisions about where they wished to work. Paternalism cannot be used as a barrier to equality. Weeks v. Southern Bell Telephone and Telegraph Co. (1969) 408 F.2d. 228 (U.S. Court of Appeals, 5th Circuit) is an American case whose reasoning has been widely adopted by Canadian human rights tribunals. It stated:

"...Moreover, Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing." (at page 236)

If certain interest groups are prepared to put themselves before the community, by having the Mayor issue a proclamation, this service cannot be denied to the group because the Mayor feels the decision of the group is unwise. This is particularly true if their perceived vulnerability arises from a characteristic that is subject to protection of the Ontario Human Rights Code. Certainly the Mayor may say "I do not think it is wise to put yourself before the public at this time." But if the group is prepared to take the step, they must be allowed the rights of any other citizen to do so. To deny them an opportunity available to all other citizens is discrimination.

It is clear law in Ontario that it is not necessary that there be an intention to discriminate.

"Without express statutory support Ontario inquiry board chairmen and judges have recognized the principle that an intention to discriminate is not a necessary element of the discrimination generally forbidden in Canadian human rights legislation ... The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination."

(Ontario Human Rights Commission and O'Malley v. Simpson Sears Ltd. (1985) 7 C.H.R.R. D/3102 at para. 24766)

Although the Code does provide for some exceptions in its application (see sections 10(1), 18, 20(1) (2), 22)) no such

exceptions exist with regard to the right to be free from discrimination in the provision of services. Therefore, although the Mayor had several reasons for his decision to treat the request of GALA differently than he treated other requests, none of these provide a defense in law for his actions.

The Mayor argued that the case of Gay Alliance v. Vancouver Sun (1979), 97 D.L.R. (3d) 577 (S.C.C.) which ruled, in a six to three decision, that the newspaper in question did not have to publish an advertisement from the Gay Alliance, is a binding precedent in my determination of the issue of the freedom of the Mayor to refuse to issue proclamations in certain instances. The opinion of this Board is that the reasoning of the Gay Alliance case is not applicable. When the Gay Alliance case came before the Court in 1979, there was no specific ground in the Human Rights Code of British Columbia, 1973 (B.C.) (2nd Sess.), c.119, as amended, concerning sexual orientation. The case was argued under the provision relating to discrimination concerning "sex" which included an exception to its application if "reasonable cause exists for such denial" (section 3). This exception was relied on by the newspaper. As stated above, no such exception exists in the Ontario statute regarding the application of sexual orientation to the provision of services. In the sixteen years since the Gay Alliance case was decided homosexuality has lost much of its negative mystique. The inclusion of sexual orientation in provincial Human Rights Codes demonstrates a political will to create a community where homosexuality is no longer considered a

basis for excluding citizens from rights and privileges enjoyed by the majority. In the Gay Alliance case, the Court ruled that the Vancouver Sun did not have to:

"accept an advertisement seeking subscriptions to a publication which propagates the views of the Alliance. Such refusal was not based upon any personal characteristics of the person seeking to place that advertisement, but upon the content of the advertisement itself." (page 591)

I do not know what views the Alliance was seeking to propagate, but the Vancouver Sun argued that the advertisement was an affront to public decency. The wording of the proclamation which is the subject of this case sought recognition for a group which is now specifically protected by the Ontario Human Rights Code. This can hardly be seen as an affront to public decency. The Board agrees that freedom of the press is a legitimate value to protect and that a newspaper may well make decisions to exclude advertisements that would be abhorrent to its readers but these considerations do not arise in the case before me.

Evidence disclosed that the Mayor suggested to the group that they could approach City Council with their request and that, therefore, the Mayor did provide a viable alternative for the group. However the testimony of Mr. Schatz, the City Clerk, was that the Council had never in its history issued a proclamation of the type sought by GALA. Indeed they did not issue proclamations at all. Therefore, for the Mayor to direct GALA to City Council is to treat them differently than other groups who are not required to go to City Council with their requests. Such different treatment is discriminatory and in contravention of the Code.

In Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at p. 174 the Supreme Court of Canada defined discrimination as follows:

"...discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individuals or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society."

The treatment of GALA by the Mayor of Hamilton fits squarely into this definition.

The Mayor argued that when he made his decision it could not have been made based on the sexual orientation of the persons making the request because the sexual orientation of the actual requesters was not known to him. Section 12 of the Code states:

"A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination."

Regardless of the Mayor's knowledge of the sexual orientation of any individual belonging to the Gay and Lesbian Alliance of Hamilton it was clear to him that the request was being made by an association that represented gay men and lesbian women. That is why they were requesting a proclamation in support of Gay Pride and that is why the Mayor refused the proclamation. His refusal was a contravention of the Code.

3. IS THE CITY OF HAMILTON LIABLE EITHER DIRECTLY BY NOT MOVING TO DO THAT WHICH THE MAYOR REFUSED TO DO, OR VICARIOUSLY BECAUSE OF THEIR RELATIONSHIP TO THE MAYOR?

i) Direct Liability

It was argued that the City Council should have proclaimed Gay Pride Week when they knew that the Mayor had refused to do so and their inaction in this matter was a violation of the Code. There is little question that the members of Council knew that this issue was before the Mayor. All councillors received a package of material from Mr. Oliver containing information about Festival'91 and several were directly asked for their support of GALA's request to the Mayor to proclaim a Lesbian and Gay Pride Week in Hamilton. At least two Councillors were called into the June 10th meeting with the Mayor and members of GALA. The Mayor's refusal to issue the proclamation was the subject of local media reports.

At no point did GALA make a request to City Council that the Council issue a proclamation. It was clear from the testimony of several witnesses, including Mr. Oliver himself, that what GALA wanted was the same kind of treatment given to other groups and individuals of the City of Hamilton. They wanted a Mayoral Proclamation. They did not know that City Council issued proclamations and, indeed, the evidence is that the City did not do so. They knew the Mayor issued proclamations and that is who they asked and that is who they wanted to issue the proclamation. By the time the Mayor had actually refused the request it was too late, in any event, to put the matter before City Council (which was on a summer schedule of meetings) in time to have the proclamation issued during the GALA Festival.

It would seem strange to hold the Council directly liable for

not doing something they were not asked to do, had no history of doing, and which could not properly be put before them to do. The state of the law in Ontario in 1991 on the issue of proclamations would certainly not make it obvious to the Council that the Mayor was acting illegally and that therefore they should immediately move to remedy the situation by acting in the absence of a request to do so.

It was argued that by virtue of the Mayor knowing of the request, the City is deemed, at law, to have known since the Mayor had an obligation to inform the Council. The flaw in this line of reasoning is that the obligation of the Mayor to inform City Council arises under the Municipal Act and this Act does not speak to his authority to make proclamations. While the Mayor was being asked to make the proclamation because of his office as Mayor it was part of more informal or ceremonial duties which are not governed by the statute. While knowledge of City Council may be imputed concerning matters the Mayor has a statutory duty to address, it is not correct to impute knowledge about matters that are outside the Mayor's duties as outlined by sections 69 and 70 of the Municipal Act. There was an attempt at the hearing to place the issuing of proclamations within the Mayor's statutory authority, but I prefer the evidence of Mr. Rust D'Eye quoted above on that point.

In any event, the City Council could not do what the group wanted, even if they did have notice of it, because what the group wanted was Mayoral Proclamation and Council had no power to force

the Mayor to issue a proclamation.

I find that the City has no direct liability in this regard.

- (ii) Is the City Council vicariously liable for the failure of the Mayor to issue the requested proclamation?

The Human Rights Code in section 45(1) specifically provides for the finding of vicarious liability with respect to officers and their corporations. Mr. Oliver urged that this provision should be applied in this case because the Mayor is a directing mind of the Council and therefore his acts are the acts of council. The theory of vicarious liability rests on the premise that the person being held liable has some sort of control or responsibility for the actions of the person complained of and therefore must suffer the consequences of that person's behaviour. The Municipal Act specifically cites the Mayor as the Chief Executive Officer but does not define that term. It was the opinion of Mr. Rust D'Eye that this designation confirms no special powers on the Mayor that are not already found elsewhere in the Municipal Act.

The operation of vicarious liability is clear when the Mayor is acting under the statute; however, in my opinion it breaks down when he is carrying out functions outside the Municipal Act. This is true because when he is acting outside the Act his actions are not in the control of Council. Council cannot order him to attend a dinner, review a parade or make a proclamation. They have no authority to suggest wording to proclamations or what the Mayor says at a retirement dinner he attends for a long serving community volunteer. Although he is acting as Mayor, he is not acting as

Chief Executive Officer of the Council when he carries out these ceremonial services for the community. I believe that the principal of vicarious liability only applies when the Mayor is acting as C.E.O. or is acting directly under the Municipal Act.

On June 29, 1993, by by-law 91-090, the City Council moved to indemnify the Mayor in respect of the proceedings before me. (exhibit 13). Does this action of the Council make them vicariously liable? The Municipal Corporation acts as an insurer as provided in the Municipal Act. Acting as an insurer does not attract primary liability for an action. The general indemnification by-law for the Corporation was passed prior to the complaint of Mr. Oliver. It contains a policy statement indemnifying an elected official who is carrying out a public function and is faced with a legal action as a consequence. The Corporation through its Council agreed to support the defense of a person who finds him/herself in this position. The specific application by Council of this policy to these proceedings was triggered by the Human Rights Commission. The action of Council, in passing the by-law to indemnify the Mayor, was to apply the fiscal policy previously adopted to this specific case. The corporate respondent did not adopt the actions of the Mayor. This line of reasoning is supported by the decision of the Ontario Court of Appeal in Casey Hill v. Church of Scientology of Toronto and Morris Manning (unreported Ont. C.A., May, 1994). In that case it was argued that the decision of the Ministry of the Attorney General to pay the legal fees of the plaintiff (a government

employee suing the defendant for libel) made the action a government action and thus attracted the protections contained in the Charter. The court firmly rejected this argument. They stated at page 47:

"... we do not perceive the evidence that the Government of Ontario provided financial assistance to Casey Hill in respect of the conduct of this proceeding as either relevant to or determinative of the Charter issue. The payment of Casey Hill's legal fees by the government does not effect a change in his constitutional status or somehow convert his lawsuit into an act of government. In Mckinney, supra, the dependency of the universities upon government funding to finance their activities, including their mandatory retirement policies, was viewed as neither relevant nor determinative. The test was whether the universities formed part of the government apparatus and whether they were implementing government policy in establishing mandatory retirement. Casey Hill's libel action cannot be characterized as an implementation of government policy."

The by-law enacted by City Council to indemnify the Mayor was required to authorize the financial support of standing policy because of budget controls in place in Hamilton. This action cannot be used to make the City vicariously liable for actions that they neither adopted nor had any control over.

CONCLUSION

It is the finding of this Board that Mayor Robert Morrow did discriminate against the complainant because of the sexual orientation of the group he represented in failing to issue the proclamation he sought. It is the finding of this board that the corporate respondent is neither directly nor vicariously liable for the action complained of.

REMEDY

Mr. Oliver had a right to be free from discrimination. This right was violated by Mr. Morrow. The Code does not allow class actions and therefore it is up to a member of a discriminated group to bring forth a complaint on behalf of that group. This action has now been on going for over three years during which time Mr. Oliver has spent considerable time and energy to see it through to conclusion. I therefore order Mr. Morrow to pay to the complainant the sum of \$5,000 in compensation for the breach of the Code suffered by Mr. Oliver.

This is not a case where special damages are appropriate and none will be ordered.

It was requested by the complainant that the Board order Mr. Morrow to proclaim Gay and Lesbian Pride Week, June 10-13, 1991. I deny that request. The people of Hamilton cannot observe a week in honour of this community when that week has passed into history.

It was requested that Mayor Morrow be ordered to proclaim Gay and Lesbian Pride week in June 1995 if requested to do so. It is the finding of this Board that he, or any person in his position, must be guided by the Ontario Human Rights Code when responding to requests for proclamations. The intent of this ruling is to assure the citizens of Ontario that issuing proclamations is like any other service and their rights in gaining access to that service are protected.

It is the practice of the Board to give specific remedies if so requested. It is therefore ordered that Mayor Robert Morrow, of the City of Hamilton, proclaim Lesbian and Gay Pride Week in the City of Hamilton in June 1995 if he is requested to do so.

I would like to thank all counsel involved with this matter for their assistance and courtesy throughout the hearing.

DATE *March 6, 1995*

Elizabeth Beckett

Elizabeth Beckett

CHAIR